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12 UNITED STATES DISTRICT COURT
13 FOR THE CENTRAL DISTRICT OF CALIFORNIA
14 WESTERN DIVISION

15 ENVIRONMENTAL WORLD WATCH,)
16 INC., et al.,)
17)
18 Plaintiffs,) Case No. 2:09-cv-4045-DMG (PLAx)
19)
20 v.) STATEMENT OF INTEREST OF
21) THE UNITED STATES AND
22 THE WALT DISNEY COMPANY, et al.,) COMMENTS ON PROPOSED
23) SETTLEMENT AGREEMENT
24)
25)
26 Defendants.)
27)
28)

29 I am writing to notify you that the United States has reviewed the proposed
30 settlement agreement in this action. This comment describes the United States'
31 concerns with the proposed settlement agreement. The United States takes no
32 position on its entry by this Court.

1 The Citizen Suit Coordinator for the Department of Justice has received a
2 copy of the proposed settlement agreement in the above-referenced case for review
3 pursuant to Clean Water Act, 33 U.S.C. § 1365(c)(3). This provision provides, in
4 relevant part:
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6 No consent judgment shall be entered in an action in which the United
7 States is not a party prior to 45 days following the receipt of a copy of
8 the proposed consent judgment by the Attorney General and the
9 Administrator.
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12 See also 40 C.F.R. § 135.5 (service on Citizen Suit Coordinator in the U.S.
13 Department of Justice). We understand that the parties have consented to February
14 6, 2015 as the date on which the 45-day period for review expires.¹ A settlement
15 that does not undergo this federal review process is at risk of being void.²
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18 In its review, the United States seeks to ensure that a proposed consent
19 judgment complies with the requirements of the relevant statute and is consistent
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22 ¹ Plaintiffs have so notified the Court. [Doc. # 452] Defendants have not disputed
23 this date and are therefore understood to have consented to it.

24 ² For purposes of the United States' right of review, the term "consent judgment"
25 in the Clean Water Act citizen suit provision has a broad meaning, and
26 encompasses all instruments entered with the consent of the parties that have the
27 effect of resolving any portion of the case.
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1 with its purposes. See Local 93, Int’l Ass’n of Firefighters v. City of Cleveland,
2 478 U.S. 501, 525-26 (1986) (a consent decree should conform with and further the
3 objectives of the law upon which the complaint was based). For example, if the
4 defendant has been out of compliance with statutory or permit requirements, the
5 proposed consent judgment should require the defendant to come into prompt
6 compliance and should include a civil penalty, enforceable remedies, injunctive
7 relief, and/or a supplemental environmental project (SEP) payment sufficient to
8 deter future violations, or combinations of the above.
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12 In this case, the Plaintiff alleged violations of sections 301(a) and 402 of the
13 Clean Water Act, 33 U.S.C. § 1311 and § 1342, for the unlawful discharge of
14 storm water, storm water containing pollutants, and non-storm water discharges at
15 a motion-picture studio in Burbank, California (the “Facility”). [Doc. # 169] On
16 September 23, 2013, this Court granted Defendant summary judgment as to the
17 storm water claims because the Facility does not fall under one of the industrial
18 classifications for which a Clean Water Act permit is required. [Doc. # 378]
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22 The non-storm water claims under the Clean Water Act remain. Defendant
23 does not dispute that samples taken from the Facility’s storm sewer system, which
24 discharges to the City of Burbank’s separate municipal storm sewer system, may
25 contain pollutants in exceedance of EPA benchmarks and the California Toxics
26
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1 Rule, including zinc, copper, and total organic carbon (TOC). *Id.* at 11. At least
2 one expert has concluded that, based on the lack of precipitation prior to sampling,
3 the water sampled in the Facility's storm sewer was non-storm water. *Id.* at 13.
4 Defendant alleges that any non-storm water discharge consists of irrigation runoff
5 and occasional fire-line flushing, which it argues are conditionally exempt under
6 the municipality's Clean Water Act permit. *Id.* at 24. After the Court rejected this
7 argument in Defendant's motion for summary judgment, Defendant took an
8 interlocutory appeal to the Ninth Circuit, which appeal is still pending. *Env'tl.*
9 *World Watch, Inc. v. The Walt Disney Co.*, No. 14-80055 (filed Apr. 18, 2014).
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12 The parties have now reached a tentative settlement agreement, which the
13 United States has reviewed and discussed with the parties.³ By the terms of the
14 settlement agreement, Plaintiffs would release Defendant from all claims.
15 Settlement Agreement ¶ 13(a). The settlement is conditioned on the agreement of
16 the Court to vacate its summary judgment order finding that non-storm water
17 discharges from irrigation flows and fire-hose flushing are not conditionally
18 exempt from the requirement for a permit under the Clean Water Act. *Id.* ¶ 16(b).
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25 ³ The proposed settlement would resolve claims brought by Dennis Jackson, Robin
26 and William McCall, leaving William Dunlap and Doris Nichols as movants.
27 Claims brought by other plaintiffs in this case, including the named party,
28 Environmental World Watch, have previously been dismissed.

1 In exchange, Defendant apparently may continue its current practice of regular dry-
2 vacuum sweeping of open parking areas and semi-annual wet-vacuum sweeping of
3 covered parking areas. Defendant will also install filters in up to eight catch basins
4 that capture storm and non-storm water runoff from parking areas and roadways.
5
6 The settlement agreement does not specify the type of pollutants that the filters
7 must be designed to address, nor does it explain how this relief will be sufficient to
8 address the problem of excess zinc, copper, and TOC being discharged into the
9 municipality's storm water system. *Id.* ¶¶ 7-11.
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12 The most significant relief obtained by the proposed settlement agreement
13 appears to be directed toward Plaintiffs and Plaintiffs' counsel rather than toward
14 resolving the underlying environmental allegations. As part of the settlement
15 agreement, Defendant agrees to pay "\$250,000 of the fees and costs incurred by
16 Plaintiffs or Plaintiffs' counsel" within 21 days of receiving the executed releases.
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18 *Id.* ¶¶ 12, 20. The Court has scheduled hearing for preliminary approval of the
19 settlement for February 13, 2015.
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22 The Department of Justice believes that certain aspects of this settlement
23 agreement raise significant questions. As an initial matter, a settlement agreement
24 should not agree to action that conflicts with or violates the statute upon which the
25 complaint was based. *See Local 93*, 478 U.S. at 526; *Sierra Club v. Electronic*
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1 Controls Design, 909 F.2d 1350, 1355 (9th Cir. 1990); Citizens for a Better
2 Environment v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983). Here, this Court
3 has already determined that the alleged irrigation flows and fire-hose flushing are
4 not exempt from the Clean Water Act’s permitting requirement. [Doc. # 378] It
5 therefore is unusual that the settlement agreement contains no relief relating to this
6 requirement. Settlement Agreement ¶¶ 7, 11.

9 Second, the requirements imposed by the proposed settlement agreement
10 appear to be exceedingly modest. In effect, Defendant will be required to install
11 and maintain “drop-inlet filters” at a maximum of eight catch basins that capture
12 storm water and non-storm water runoff from the parking lots and roadways at the
13 Facility. Settlement Agreement ¶ 8. Upon information and belief, “drop-inlet”
14 describes the type of location in which the filter is to be deployed. It does not
15 indicate what type of pollutants the filter is intended to capture or at what rate. Nor
16 is it clear from the proposed settlement agreement or our conversations with the
17 parties what basis the parties have for believing this relief will ameliorate
18 environmental conditions on the ground. Because the primary purpose of the
19 citizen-suit provision is to allow private parties to abate environmental violations,
20 Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 61
21 (1987), the resolution must “further[] the objectives upon which the law is based.”

1 Elec. Controls Design, 909 F.2d at 1355 (citations omitted). Resolutions like the
2 proposed settlement agreement at issue here are unusual in that they do not appear
3 to satisfy this standard.
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5 Instead, the proposed settlement agreement would allocate the bulk of the
6 relief to monetary payment in the form of attorneys' fees.⁴ One of the
7 considerations to be weighed in evaluating settlements pursuant to the citizen-suit
8 provisions of the Clean Water Act is whether the agreement is "abusive, collusive,
9 or *inadequate*." 133 Cong. Rec. S. 737 (daily ed. Jan. 14, 1987) (statement of Sen.
10 Chafee) (emphasis added). The United States applies particularly close scrutiny to
11 consent judgments that combine significant payments of fees with limited
12 injunctive relief and has substantial concerns about the imbalance here. The
13 United States has discussed this with the parties and has not learned of any unusual
14 considerations that explain this approach to settlement.⁵
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20 ⁴ To the extent that the proposed settlement agreement purports to compensate
21 Plaintiffs themselves, the United States objects to entry of this part of the
22 agreement. The citizen-suit provisions of the Clean Water Act do not authorize
23 monetary compensation except for the costs of litigation (including reasonable
24 attorney and expert witness fees). 33 U.S.C. § 1365(d).

25 ⁵ Note that a case that is litigated to judgment but achieves limited relief may not
26 warrant a full fee award. "[T]he extent of a plaintiff's success is a critical factor in
27 determining the proper amount of award of attorney's fees." Hensley v. Eckerhart,
28 461 U.S. 424, 440 (1983); see also Farrar v. Hobby, 506 U.S. 103 (1992) (finding

1 Therefore, the United States requests that, if the Court enters the proposed
2 settlement agreement, it do so only after first inquiring into the circumstances that
3 justify adoption of the unusual provisions outlined above. The concerns of the
4 United States presented herein would become particularly acute should future
5 citizen-suit cases demonstrate a pattern and practice of inadequate settlement.
6 Under such circumstances, the United States notes that it would be appropriate for
7 the Court to account for such pattern and practice in deciding whether and under
8 what terms to approve resolution of the case. The United States will not otherwise
9 oppose entry of the settlement agreement in this case. We accordingly notify the
10 Court of that fact.

11 The United States affirms for the record that it is not bound by this
12 settlement. See, e.g., Hathorn v. Lovorn, 457 U.S. 255, 268 n.23 (1982) (Attorney
13 General is not bound by cases to which he was not a party); Gwaltney, 484 U.S. at
14 60 (explaining that citizen suits are intended to “supplement rather than supplant
15 governmental action”); Elec. Controls Design, 909 F.2d at 1356 n.8 (explaining
16 that the United States is not bound by citizen suit settlements, and may “bring its
17 own enforcement action at any time”); 131 Cong. Rec. S15,633 (June 13, 1985)
18 (statement of Senator Chafee, on Clean Water Act section 505(c)(3), confirming
19 that a plaintiff who had recovered only \$1 in nominal damages was not entitled to
20 attorney’s fees); Corder v. Brown, 25 F.3d 833, 836 (9th Cir. 1994).

1 that the United States is not bound by settlements when it is not a party). The
2 United States also notes that, if the parties subsequently propose to modify any
3 final settlement agreement entered in this case, the parties should so notify the
4 United States, and provide a copy of the proposed modifications, forty-five days
5 before the Court enters any such modifications. See 33 U.S.C. §1365(c)(3).
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8 We appreciate the attention of the Court. Please contact the undersigned at
9 (202) 616-9473 if you have any questions.
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11 Sincerely,
12

13 /s/ Christine Ennis

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PROOF OF SERVICE

On this 6th day of February, 2015, the Statement of Interest of the United States and Comments on the Proposed Settlement Agreement was served on counsel below by electronic filing:

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